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APR 2 1960
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IN THE

Supreme Court of the United States

October Term, 1959

No. 771

CHARLES WALDER, *et al.*,
Petitioners,

against

PARAMOUNT PUBLIX CORP., *et al.*,
Respondents.

BRIEF FOR THE PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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This brief, in reply to respondents' brief in opposition to a writ of certiorari petitioned for, is filed for the purpose of inviting the attention of this court to certain unfounded statements of fact averred by respondents and equally unfounded argument premised thereon.

In the first place the Court of Appeals for the Second Circuit did not characterize petitioners' arguments as "wholly unfounded" as stated at page 1 of respondents' brief. It did attribute "a patently unsound" argument to the petitioner which petitioner made neither in the briefs nor during oral argument (A. 49). This is specifically discussed in the petition as being demonstrative of arbitrary and capricious consideration (Pet. 7).

Petitioners have not conceded as claimed by respondents at page 4 of their brief that the lease was not given by Walwal as consideration for the stock

Respondents at page 4 of their brief state:

> "In accord with the agreement 50 shares of Operating stock were issued to Enterprises and 50 shares to Walwal for which each paid $1,000. This $1,000 payment by each stockholder was the sole

consideration for the stock and petitioners' counsel conceded that the lease was not given by Walwal as consideration for the stock (D. A. 119a)."

The record (D. A. 119a) states:

> "The Court: * * * Instead of taking it themselves and going into partnership individually, it wasn't a partnership, we know, but pooling their interests individually with the Paramount Enterprises, Inc., they had the stock in Tivoli Operating Corporation that they would have received issued to the Walwal Corporation because it wasn't issued to the Walwal Corporation for rent, was it, that fifty per cent of the stock?
>
> "Mr. Handelman: No, not for rent, sir. * * * "

Mr. Handelman, a prior counsel in the case, is simply saying that the stock was not distributed to Walwal as rent. This is not in any way inconsistent with the petitioners' theory that although rent was paid at the minimum customary rate of fifteen per cent on gross receipts under the lease, the lease had an asset value in excess of minimum fair rent paid which Walwal contributed to Tivoli Operating thereby enhancing the real value of the capital stock issued to Paramount Enterprises by Operating to an amount far in excess of the $1,000 paid by Operating therefor.

Petitioners have not conceded that the impact of the conspiracy was not on Operating as stated by respondents at page 7 of their brief

In their argument that Tivoli Operating has sustained no injury as the result of the conspiracy, respondents assert that prior trial counsel Mr. Handelman) concedes the impact of the conspiracy was not on Operating, but such impact was on Walwal. Even assuming this statement of Mr. Handelman is not out of context, it is meaningless, since the complaint charges in effect in paragraph 85th that the impact of the conspiracy was on Operating, as well as on Walwal (A. 28). See paragraph of complaint numbered 85th instead of paragraph 83rd suggested by respondents.

Petitioners have not conceded that this action was not brought for the benefit of the Trustees of Operating as stated at pages 7 and 8 of the respondents' brief

Ultimately, the Walders will be the beneficiaries of a successful Tivoli Operating suit, since Walwal, as a stockholder in Operating, has an equity therein and the Walders own all of the Walwal stock. The fact that they have such an ultimate interest does not mean the corporation in which they have such an ultimate interest cannot be injured or damaged as the corporate entity representative of its stockholders to whom it is responsible. In fact, it is elemental that such stockholders could not sue in their stockholding capacity, but must sue through the corporation. This very rule was enunciated in dismissing the individual actions of the stockholders in the case at bar. The plaintiffs' (*i.e.*, petitioners') counsel's statement refers to the ultimate benefit to stockholders emanating from a recovery by Tivoli Operating Corporation which is the entity directly damaged.

The hypothetical case cited by the respondents at page 8 of their brief as indicative of non-injury to Tivoli Operating and has no relevancy to the facts in the case at bar

If Enterprises created a new corporation to operate the Tivoli Theatre in which it owned one hundred per cent of the stock, such a corporation could not be injured by the conspiracy and could not successfully sue. No fault can be found with this conclusion, since the solely owned subsidiary would be the exclusive creation of Enterprises and the conspiracy could not be the coercive inducement for the issuance of capital stock or the payment of management fees. The foregoing hypothetical case is, therefore, an absurd analogy. However, in a situation as in the case at bar where the victim of one phase of the conspiracy owned fifty per cent of the stock (*i.e.*, Walwal) and Paramount Enterprises, a co-conspirator, owned the other fifty per cent

of the stock, it could not be the stock control of the conspirator (*i.e.*, Paramount Enterprises) but the economic coercion emanating from the conspiracy which forced the corporation operating the Tivoli Theatre (*i.e.*, Tivoli Operating) to pay tribute to obtain a proper clearance of motion pictures.

Contrary to respondents' assertions at page 9 of their brief the Lefcourt and Pearlman affidavits were based upon the capital stock worth premised upon earning power as evidenced and justifies a trial of the issues

The record shows by the affidavits of these experts, completely ignored by the courts below, that based on earnings of Tivoli Operating from 1937 to 1947 the stock distributed to Paramount Enterprises for $1,000 was worth $61,000.

Also contrary to the statement of the respondents in their reply brief at page 9, although Tivoli Operating was a new corporation, the Tivoli Theatre which it operated as a successor to Tivoli Theatre, Inc., was an operating business and not a non-operating business as respondents claim (A. 46). This clearly justifies the opinion of the experts as to the value of the stock of an operating business as reflected by earnings when such business was unencumbered by delayed clearances of motion pictures.

Claims for management fees were not abandoned by petitioners as asserted by respondents at page 10 of their reply brief

Petitioners' counsel acquiesced in Judge Dimock's statement that the case boiled down to the fact that Tivoli Operating gave stock to the conspirators for considerably less than it was worth because of the conspiracy. The subject of the discussion at this time before Judge Dimock was the value of the stock and the plaintiffs' theory premised upon such value. There had been no discussion about management fees, so that comments by plaintiffs'

(*i. e.*, petitioners') counsel could not possibly be construed as abandoning plaintiffs' claim for management fees, alleged in the complaint. This question was also specifically before the court below and was completely ignored by it in rendering decision.

Conclusion

Respondents appear to concede at page 10 of their brief that the decision of the court below was premised upon the conjectures of Judge Dawson in *Fanchon & Marco, Inc.* v. *Paramount Pictures,* 133 F. Supp. 839, 845 (S. D. N. Y. 1955), which is fully quoted in the petition at pages 8 and 9. It seems reasonable to assume therefrom that there is an important undecided and novel question as set forth by petitioners at page 3 of their petition upon which this Court should decisively rule.

It also seems important for the reasons given in the petition that this Court should exercise its supervisory jurisdiction because of the failure of the court below to consider all of the issues specifically before it, particularly the question of management fees paid under the economic coercion of the Paramount conspiracy from 1937 to 1947 as alleged in paragraph 85th of the complaint (A. 28).

For each of the reasons set forth herein and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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